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Suruhanjaya Tenaga v Strong Elegance Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCvC)(W)-168–03 OF 2023
HANIPAH FARIKULLAH, AZIMAH OMAR AND AZHAHARI RAMLI JJCA
29 FEBRUARY 2024

C

Contract — Contingent contract — Non-fulfillment of conditions precedent — appellant withdrew award of contract to respondent when latter could not fulfill conditions precedent within contractual time-frame — Whether termination of award was lawful as failure to fulfill conditions precedent showed D *respondent did not have the capacity or readiness to undertake the contract — Whether High Court ('HC') misconstrued relevant provisions of Contracts Act 1950 when it held that contract was capable of being performed albeit outside the contractually-agreed time limits — Whether HC failed to appreciate that time was of essence of the contract such that respondent's failure to fulfill conditions precedent* E *within stipulated timeframe entitled appellant to terminate*

The appellant had invited tenders for the construction, operation and maintenance of a Large Scale Solar Photovoltaic Plant ('the LSS project') which was divided into four phases of development. A consortium of three entities F successfully bid to undertake the first phase of the project ('LSS1') and they incorporated the respondent to carry out the job. Under the terms of award of the LSS1 project, the respondent had to ensure that it had possession of land for the project for at least 23 years so that it could produce and sell the solar energy generated by the LSS1 plant to Tenaga Nasional Bhd ('TNB') for a G period of 21 years as provided under a solar power purchase agreement ('SPPA') the respondent had signed with TNB. The SPPA also expressly stipulated as a condition precedent that the respondent had to procure a land lease agreement ('LLA') for the project land for 23 years. The obtaining of the LLA was also insisted upon as a pre-condition by the respondent's financier for the project. H On the respondent's undertaking that it would secure the LLA, the appellant awarded the LSS1 project to the respondent expressly specifying that the latter was to, inter alia: (a) achieve financial closing date ('FCD') [ie, secure project financing that was ready for initial drawdown] by 30 July 2017 ('FCD date'); and (b) achieve commercial operation date ('COD') by 31 December 2018 I ('COD date'). The respondent sought extensions of time to the FCD and COD dates while it attempted to secure a 23-year LLA for the project. Despite the appellant granting four conditional extensions of time to the FCD date (but refusing to grant any extension to the COD date), the respondent could not secure the requisite LLA which resulted in the appellant withdrawing and

terminating its award of the project to the respondent. Contending that the termination was unlawful, the respondent sued the appellant in the High Court arguing that since the grant of a 23 year LLA from the Government to the respondent was beyond the respondent's control, the appellant was obliged to wait until that event happened whilst the respondent was entitled to legitimately expect that to be the case. The respondent also argued that the four conditional extensions of time that were granted by the appellant showed that time was at large and no longer of the essence of the contract. Relying upon ss 32 and 36 of the Contracts Act 1950, the High Court judge ('HCJ') held that although the LSS1 award was a contingent contract (dependent on the respondent obtaining the LLA and achieving the FCD within specified time limits), it had not been rendered impossible of performance but was capable of being performed albeit outside the contractually agreed time limits. The instant appeal was against the High Court's decision.

Held, unanimously allowing the appeal, setting aside all orders, directions and decision made by the High Court and dismissing the respondent's claim against the appellant:

(1) The incorrect interpretation and application of ss 32, 33 and 36 of the Contracts Act 1950 ('the CA') by the High Court judge ('HCJ') contradicted the rudimentary principles of time in contracts and rendered time stipulations in contracts meaningless. Contracts did not only consider the 'possibility of performance of a contingency' but also the time limit within which the contingency had to be performed. If possibility of performance was the only consideration in determining the validity of a contract, then an innocent party would be forced to accept late performance of a contract, however grossly late it was. This was clearly illogical both in law and fact and certainly could not have been within Parliament's intention when it enacted the CA (see paras 29 & 58).

(2) The appellant agreed to proceed with the LSS1 award if the respondent could achieve FCD (and obtain the LLA) within the final FCD deadline. Clearly, the LSS1 award was a contingent contract with stipulation of time (see para 31).

(3) The respondent's reliance on s 33 of the CA was plainly wrong as that section made no reference to time within which an event or contingency must occur. Section 33 merely declared that a contingent contract to do or not to do anything if an uncertain future event happened was unenforceable unless and until that event happened; and that if the event became impossible, the contract became void. In contrast, the LSS1 award was contingent upon the respondent obtaining the LLA and achieving FCD within a specified time-frame (see paras 33–35).

(4) Applying s 36 of the CA to the facts in the instant case, the contract would become void if the event (the FCD) was not achieved within the contract's stipulated time period. This interpretation remained unshaken even if the LLA or FCD was possible to be obtained or achieved after the contractual time period had lapsed. The HCJ omitted to focus on the importance of time specified in s 36 and gave importance only to the possibility of the contract being performed. The HCJ's interpretation, if upheld, would mean that a party must accept all late and out of time performance so long as performance of the contract was still 'possible' (see paras 42, 44 & 47).

(5) The fact that the appellant had granted the respondent four conditional extensions of time did not cause time to be at large as each of the conditional time extensions stipulated new specific and strict deadlines for the respondent to adhere to. Although extensions of time were granted in respect of the FCD date, no extension was granted in respect of the COD date which meant the appellant was resolute that the LSS1 project should be commercially operative by the date specified when the award was granted. The appellant had not conducted itself in any manner that would have led the respondent to legitimately expect that the appellant would accept late performance of the LSS1 award beyond the final FCD date and COD date (see paras 51–54 & 56).

(6) As the respondent was unable to secure an LLA for 23 years for the project land within the set contractual period, the appellant could not be legally expected to wait indefinitely until the respondent could do so. In the circumstances, the appellant was at liberty to terminate the LSS1 award (see para 57).

[Bahasa Malaysia summary

Perayu telah mempelawa tender untuk pembinaan, operasi dan penyelenggaraan Loji Fotovoltaik Suria Berskala Besar ('projek LSS') yang dibahagikan kepada empat fasa pembangunan. Konsortium tiga entiti berjaya membida untuk melaksanakan fasa pertama projek ('LSS1') dan mereka memperbadankan responden untuk menjalankan tugas itu. Di bawah syarat pemberian projek LSS1, responden perlu memastikan ia memiliki tanah untuk projek tersebut sekurang-kurangnya 23 tahun supaya ia boleh mengeluarkan dan menjual tenaga solar yang dijana oleh loji LSS1 kepada Tenaga Nasional Bhd ('TNB') untuk tempoh 21 tahun seperti yang diperuntukkan di bawah perjanjian pembelian tenaga suria ('PPTS') yang responden telah tandatangani dengan TNB. PPTS juga dengan jelas menetapkan sebagai syarat duluan bahawa responden perlu mendapatkan perjanjian pajakan tanah ('PPT') untuk tanah projek selama 23 tahun. Mendapatkan PPT juga telah didesak sebagai pra-syarat oleh pembiaya responden untuk projek tersebut. Mengenai aku janji responden bahawa ia akan mendapatkan PPT, perayu menganugerahkan projek LSS1 kepada responden dengan secara nyata menyatakan bahawa yang

ia adalah untuk, antara lain: (a) mencapai tarikh tutup kewangan ('TTK') [iaitu, pembiayaan projek yang selamat. yang sedia untuk pengeluaran awal] menjelang 30 Julai 2017 ('tarikh TTK'); dan (b) mencapai tarikh operasi komersial ('TOK') selewat-lewatnya 31 Disember 2018 ('tarikh COD'). Responden meminta lanjutan masa kepada tarikh TTK dan TOK semasa ia cuba mendapatkan PPT 23 tahun untuk projek itu. Walaupun perayu memberikan empat lanjutan masa bersyarat kepada tarikh TTK (tetapi enggan memberikan sebarang lanjutan kepada tarikh TOK), responden tidak dapat mendapatkan PPT yang diperlukan yang menyebabkan perayu menarik balik dan menamatkan pemberian projek tersebut kepada responden. Dengan berpendapat bahawa penamatan itu menyalahi undang-undang, responden menyaman perayu di Mahkamah Tinggi dengan alasan bahawa oleh kerana pemberian PPT 23 tahun daripada Kerajaan kepada responden adalah di luar kawalan responden, perayu diwajibkan menunggu sehingga peristiwa itu berlaku sementara responden berhak untuk secara sah mengharapkan perkara itu berlaku. Responden juga berhujah bahawa empat lanjutan masa bersyarat yang diberikan oleh perayu menunjukkan bahawa masa adalah bebas dan bukan lagi intipati kontrak. Bergantung kepada ss 32 dan 36 Akta Kontrak 1950, hakim Mahkamah Tinggi ('HMT') memutuskan bahawa walaupun award LSS1 adalah kontrak luar jangka (bergantung kepada responden memperoleh PPT dan mencapai TTK dalam had masa yang ditetapkan), ia tidak dijadikan mustahil bagi pelaksanaan tetapi mampu dilaksanakan walaupun di luar had masa yang dipersetujui secara kontrak. Rayuan semasa adalah terhadap keputusan Mahkamah Tinggi.

Diputuskan, sebulat suara membenarkan rayuan, mengetepikan semua perintah, arahan dan keputusan yang dibuat oleh Mahkamah Tinggi dan menolak tuntutan responden terhadap perayu:

(1) Tafsiran dan penggunaan ss 32, 33 dan 36 yang salah dalam Akta Kontrak 1950 ('AK') oleh hakim Mahkamah Tinggi ('HMT') bercanggah dengan prinsip asas masa dalam kontrak dan menjadikan penetapan masa dalam kontrak tidak bermakna. Kontrak bukan sahaja mempertimbangkan 'kemungkinan pelaksanaan kontingensi' tetapi juga had masa di mana kontingensi perlu dilaksanakan. Jika kemungkinan pelaksanaan adalah satu-satunya pertimbangan dalam menentukan kesahihan kontrak, maka pihak yang tidak bersalah akan dipaksa untuk menerima kontrak yang lewat dilaksanakan, walau bagaimanapun ia terlambat. Ini jelas tidak logik dari segi undang-undang dan fakta dan pastinya tidak mungkin dalam hasrat Parlimen apabila ia menggubal AK (lihat perenggan 29 & 58).

(2) Perayu bersetuju untuk meneruskan award LSS1 jika responden boleh mencapai TTK (dan memperoleh PPT) dalam tarikh akhir TTK akhir. Jelas sekali, pemberian LSS1 adalah kontrak kontinjen dengan ketetapan masa (lihat perenggan 31).

(3) Kebergantungan responden pada s 33 AK adalah jelas salah kerana seksyen itu tidak merujuk kepada masa di mana sesuatu peristiwa atau kontingensi mesti berlaku. Seksyen 33 hanya mengisytiharkan bahawa kontrak luar jangka untuk melakukan atau tidak melakukan apa-apa jika kejadian masa depan yang tidak pasti berlaku adalah tidak boleh dikuatkuasakan melainkan dan sehingga peristiwa itu berlaku; dan jika peristiwa itu menjadi mustahil, kontrak itu menjadi terbatal. Sebaliknya, pemberian LSS1 adalah bergantung kepada responden memperoleh PPT dan mencapai TTK dalam jangka masa tertentu (lihat perenggan 33–35).

(4) Menggunakan s 36 AK kepada fakta dalam kes semasa, kontrak akan menjadi terbatal jika peristiwa (TTK) tidak dicapai dalam tempoh masa yang ditetapkan kontrak. Tafsiran ini kekal tidak goyah walaupun PPT atau TTK mungkin diperolehi atau dicapai selepas tempoh masa kontrak telah luput. HMT tidak memberi tumpuan kepada kepentingan masa yang dinyatakan dalam s 36 dan hanya memberi kepentingan kepada kemungkinan kontrak dilaksanakan. Tafsiran HMT, jika dipertahankan, bermakna sesebuah pihak mesti menerima semua prestasi lewat dan luar masa selagi pelaksanaan kontrak yang masih 'mungkin berlaku' (lihat perenggan 42, 44 & 47).

(5) Hakikat bahawa perayu telah memberikan responden empat lanjutan masa bersyarat tidak menyebabkan perluasan masa kerana setiap lanjutan masa bersyarat menetapkan tarikh akhir khusus dan ketat yang baru untuk dipatuhi oleh responden. Walaupun lanjutan masa telah diberikan berkenaan dengan tarikh TTK, tiada lanjutan diberikan berkenaan dengan tarikh TOK yang bermakna perayu bertekad bahawa projek LSS1 harus beroperasi secara komersial pada tarikh yang dinyatakan apabila award itu diberikan. Perayu tidak berkelakuan dalam apa-apa cara yang akan menyebabkan responden menjangkakan secara sah bahawa perayu akan menerima prestasi lewat award LSS1 melebihi tarikh TTK dan tarikh TOK (lihat perenggan 51–54 & 56).

(6) Memandangkan responden tidak dapat mendapatkan PPT selama 23 tahun untuk tanah projek dalam tempoh kontrak yang ditetapkan, perayu tidak boleh dijangka secara sah untuk menunggu selama-lamanya sehingga responden boleh berbuat demikian. Dalam keadaan tersebut, perayu bebas untuk menamatkan award LSS1 (lihat perenggan 57).]

Cases referred to

Aberfoyle Plantations Ltd v Khaw Bian Cheng [1960] 1 MLJ 47, PC (folld)

Amarjit Singh a/l Kartar Singh v Kung Boon Chin & Ors [2010] 8 MLJ 149, HC (refd)

Ibsul Development (SEL) Sdn Bhd v Perbadanan Kemajuan Negeri Selangor [2016] MLJU 420, HC (folld)

Loke Yuen Cheng & Anor v Vimtex Sdn Bhd [1998] 4 MLJ 169, CA (refd)

National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd [1983] 2 MLJ 211, FC (distd)

Legislation referred to

Contracts Act 1950 ss 32, 33, 36, 36(1)
Energy Commission Act 2001
Rules of Court 2012 O 33 r 2

Appeal from: *Strong Elegance Sdn Bhd v Suruhanjaya Tenaga* [2023] MLJU 932 (High Court, Kuala Lumpur)

M Ramachelvam (with Dir Kheizwan bin Abd Halim @ Kamaruddin, Amierul Razzi bin Ahmad Yusof and Nurul Syuhada bt Abdullah) (Manjit Singh Sachdev Mohammad Radzi & Partners) for the appellant.
Prem Anand s/o Theruvengadam (with Joseph Michael Raju a/l Joseph Alexander) (Deol & Gill) for the respondent.

Azimah Omar JCA:

INTRODUCTION

[1] The appeal before us is a case of breach of contract and it is essentially concerning a miscomprehension of the tenets or workings of a 'contingent' or 'conditional' contract under ss 32 and 36 of the Contracts Act 1950 where the validity or continuity of a contract was contingent or conditional upon the respondent upholding its end of the bargain within a contractually agreed time.

[2] Before us, a contract is entered between the appellant and the respondent which contractually requires the respondent to perform a certain obligation within a set contractual time period. The respondent was unable to perform the said obligation within the prescribed contract period.

[3] At the outset, it is our view that the learned High Court judge ('learned judge') had misread ss 32 and 36 of the Contracts Act 1950 and had incorrectly held that when the parties agreed to the said time contingency or time condition, it was incumbent upon the parties to elect to continue with the contract so long as the contingency or condition was 'possible to be performed' (albeit out of contractual time).The reading of the provisions by the learned judge in such manner, in our view was entirely contradictory to the literal stipulations of the provisions. We identified that this incorrect reading was also influenced by the respondent's misconceived reliance of s 33 of the Contracts Act 1950 which was ENTIRELY INAPPLICABLE in the appeal before us.

[4] Before we embark in demystifying this misinterpretation of both law and fact, it is only apposite that we appreciate the factual matrix of the case leading up to this appeal.

FACTS OF THE CASE

[5] Under the 11th Malaysian Plan, the Government of Malaysia was committed to reduce its carbon footprint (and emission) by increasing the use of renewable energy. One such renewable energy being solar energy. The Energy Commission/Suruhanjaya Tenaga ('the appellant') was the statutory body established under the Energy Commission Act 2001 by the Government of Malaysia to undertake initiatives to increase the capacity of large scale solar photovoltaic installations to achieve the government's zero emission target ('the LSS project').

[6] Beckoned by the LSS project, the appellant had issued a request for proposal ('RFP') to the industry players in Malaysia to participate in a tender exercise to construct, operate and maintain a large scale solar photovoltaic plant ('LSSPVP').

[7] We must be appropriately minded that there were multiple RFPs issued for *separate and distinct phases within the LSS project*. In total there were four phases within the LSS project being LSS1, LSS2, LSS3, and LSS4.

[8] Strong Elegance Sdn Bhd ('the respondent/SESB') participated (as the designated corporate vehicle representing the successful bidder) in the RFP for LSS1. The subject LSS project in the appeal before is LSS1. Thus, we are aware that the respondent had wrongly referred to and related matters in LSS3 despite the subject LSS in the appeal before us was only LSS1.

[9] SESB was incorporated to undertake the LSS1 project on behalf of the successful bidders for LSS1 (who were also shareholders of SESB) namely Synergy Generated Sdn Bhd, Scomi Group Bhd, and Lembaga Tabung Angkatan Tentera (collectively referred to as 'the consortium').

[10] The RFP for LSS1 under RFP: ST(IP/JPIKSE/PI)19/1/4 ('RFP1') was issued by the appellant on 26 May 2016. RFP1 calls for bidders for the construction, operation, and maintenance of a LSSPVP of 30MW capacity. Apart from the terms stipulated under the RFP1, the terms and obligations of parties are to be collectively read together with: (a) the solar power purchase agreement with Tenaga Nasional Bhd ('SPPA'); and (b) the land lease agreement of at least 23 years of the project land ('LLA') to be identified by the successful bidder (the respondent):

PART 2 — Project Document

1.0 Project Document

The Project Document which will be entered into by each Successful Bidder include:

– Solar Power Purchase Agreement (SPPA);

– Land Lease Agreement (LLA), where applicable; and

– any other document which is deemed necessary.

[11] It was resolutely clear under cl 4.7.1 of RFP1 that the party *solely responsible* to ensure that an LLA for 23 years was obtained for the project land WAS THE RESPONDENT (as the consortium's corporate vehicle):

4.7.1 Rights to Use of Land

The Bidder shall provide evidence that the site for the LSSPV Plant as per requirement of the Plant is under clear posession of the Bidder or the Bidder has the legal right to use the site. The Bidder shall furnish the following documentary evidences and information:

[12] The contractual period for the production and sale of solar energy to TNB under the SPPA was for 21 years. Thus, it was mutually understood by both the appellant and respondent that it was incumbent upon the respondent to obtain a LLA from the landowner (of the project land) for at least a 23 years' period:

2.0 Capacity Packages for the RFP

This Large Scale Solar PV Plants RFP is an invitation for Bids from Qualified Participants who are eligible and have been selected in the pre-qualification exercised conducted by ST in March 2016 to finance, design, supply, build, own, operate and maintain Large Scale Solar PV Plants to supply and sell energy produced by the PV solar plants to the electricity supply utilities in Peninsular Malaysia or Sabah and Pulau Labuan under long term power purchase agreements. A Successful Bidder will be required to entered into a power purchase agreement for a term of 21 years with the electricity supply utility.

[13] The consortium submitted its bid for LSS1 on 22 September 2016, upon which the appellant had accepted the consortium's bid via its letter of acceptance dated 15 December 2016 ('2016 LOA').

[14] In the meantime, the consortium (via the respondent) also entered into the SPPA dated 27 March 2017 with TNB. Clause 3.1(e) of the SPPA also expressly stipulated a condition precedent that the respondent was solely responsible to ensure the procurement of the requisite 23 years' LLA for the project land:

(e) SPP has submitted to TNB and the Suruhanjaya Tenaga, one (1) certified copy of the executed Site Agreement which is in full force and effect and all conditions precedent to its effectiveness are satisfied or waived thereunder; and

[15] Before any letter of award was issued by the appellant to the respondent as the consortium's corporate vehicle (in furtherance of the successful bid), there arose a crucial issue as to the respondent's identified project land. The respondent had identified a land known as PT2, HS (D) 76387, Bandar Sungai Petani, Daerah Kuala Muda, Kedah ('project land'). Although the mutually agreed project period was at least 23 years, the respondent (the consortium) had only managed to obtain a three years' lease from the Ministry of Defence. This would clearly put the entire LSS1 at grave risk as the respondent would only legally have three years' worth of rights and access over the project land despite the intended contractual period of 23 years (20 YEARS LESS than what was required):

PERMOHONAN PENYEWAAN TANAH MILK PERSEKUTUAN KEGUNAAN KEMENTERIAN PERTAHANAN MALAYSIA DI ATAS PT 2, H.S.(D) 76387, BANDAR SUNGAI PETANI, DAERAH KUALA MUDA, KEDAH BAGI TUJUAN PEMBANGUNAN 30MW TENAGA BOLEH DIPERBAHARUI (SOLAR) SELUAS 301,3708 EKAR OLEH STRONG ELEGANCE SDN BHD

Dengan hormatnya saya diarah merujuk perkara di atas.

2. Sukacita dimaklumkan bahawa Mesyuarat Jawatankuasa Pengurusan Tanah (Khas) Kementerian Pertahanan Malaysia pada 05 April 2017 telah meluluskan secara dasar permohonan pihak tuan bagi sewaan tanah berkenaan tertakluk kepada syarat-syarat berikut:

i. Kelulusan dasar adalah untuk tempoh enam (6) bulan berkuatkuasa dar 1 Mei 2017 sehingga 31 Oktober 2017 bagi pihak tuan menyediakan dan mengemukakan pelan Kebenaran Merancang/Pembangunan (DO) kepada Majlis Perbandaran Sungai Petani (MPSPK);

ii. Penyewaan adalah untuk tempoh selama Tiga (3) Tahun yang akan berkuatkuasa pada 1 November 2017 sehingga 31 Oktober 2020 tertakluk kepada kelulusan daripada MPSPK;

[16] Understandably, the appellant had via its letter dated 7 April 2017 ('CP letter') raised its concern over the non-fulfilment of the terms in RFP1, the 2016 LOA, and the SPPA by the respondent (the consortium). Due to the insufficient lease term obtained by the respondent, the appellant had duly placed additional specific CONDITIONS PRECEDENT for the respondent to abide by before the appellant would issue an award to the respondent:

4. Oleh yang demikian, dengan hanya mengemukakan dokumen perjanjian sewaan yang tidak mempunyai tempoh hanya tiga tahun, Strong Elegance Sdn Bhd didapati tidak mematuhi Syarat Duluan seperti dinyatakan dalam perkara 3 di atas.

Seterusnya, sekiranya Syarat Duluan ini tidak dapat dipenuhi dalam masa yang ditetapkan, SPPA tersebut akan terbatal.

5. Bagi memastikan *effectiveness* SPPA dapat dicapai dan projek dapat dilaksanakan dalam masa yang dijadualkan, pihak Strong Elegance Sdn Bhd adalah diminta untuk melaksanakan perkara berikut:

i. melanjutkan tamat tempoh sah laku *Bid Bond* [Ref: 99010BGU6168327] yang tamat tempoh sah laku pada 22 April 2017 kepada 4 Jun 2017;

ii. mengemukakan dokumen *Bid Bond* yang telah dilanjutkan tempoh sah laku seperti diminta dalam perkara 5 (i) di atas kepada Suruhanjaya pada atau sebelum 14 April 2017; dan

iii. memuktamadkan perjanjian tanah yang mempunyai tempoh sekurang-kurangnya selama 21 tahun selepas *Commercial Operation Date* dan mengemukakan dokumen perjanjian tersebut kepada Suruhanjaya Tenaga pada atau sebelum 4 Mei 2017;

Letter of Award hanya akan dikeluarkan kepada Strong Elegance Sdn Bhd selepas dokumn perjanjian tanah dimuktamadkan dan dikemukakan kepada Suruhanjaya Tenaga dalam tempoh yang ditetapkan.

[17] The respondent, in its letter dated 13 April 2017 ('CP acceptance'), inter alia:

(a) ADMITTED that the *respondent had not fulfilled* the terms and condition precedent under the RFP1 and the 2016 LOA by failing to obtain a 23 years' lease period over the project land; and

(b) UNDERTOOK AND AGREED to the conditions precedent placed by the appellant to ensure that the respondent would expeditiously secure the LLA for 23 years from the Ministry of Defence:

> Pihak kami sedia maklum akan kepentingan perjanjian ini dan sedang berusaha sedaya-upaya untuk mempercepatkan proses perjanjian. Memandangkan proses ini melibatkan pelbagai pihak iaitu Tentera Darat, Kementerian Pertahanan serta *JKPTG*, segala urusan perlu di lakukan secara terperinci dan mengikut prosedur tertentu. Untuk makluman tuan, pihak kami kini sedang berurusan dengan Kementerian Pertahanan dan *JKPTG* untuk mempercepatkan proses pajakan 23 tahun tersebut.
>
> Kami juga perlu melalui proses yang melibatkan *UKAS*, memandangkan projek ini melibatkan kerjasama antara Strong Elegance Sdn Bhd dan Tentera Darat (*TD*) dalam bidang *Renewable Energy* dengan penggunaan tanah *TD*.

[18] In view of the respondent's admission and agreement to undertake the conditions precedent, the appellant awarded the LSS1 project to the respondent via the letter of award dated 2 May 2017 ('LSS1 award'). The pertinent terms of the LSS1 award, inter alia, were as follows:

A (a) time is of the essence;

(b) cl 4(i) of the LSS1 award: the respondent must achieve financial closing date ('FCD') (secured project financing which was already ready for initial drawdown) by 30 July 2017 ('FCD date');

B (c) cl 4(h) of the LSS1 award: the respondent must achieve commercial operation date ('COD') by 31 December 2018 ('COD date'); and

(d) cl 5 of the LSS1 award: the respondent must replace the RM1m bid bond with a substitute bond of RM10m by 19 May 2014 ('SB date').

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[19] It was plain and obvious that all parties have mutually understood that their contractual relationship shall always be constrained by a distinct and definite contractual time.

D **[20]** Apart from the RFP1, the 2016 LOA, and the SPPA's terms with TNB, it was also crucial to understand that the respondent's sole contractual duty and responsibility to obtain the 23 years' LLA was also critical in order for the respondent to ever achieve FCD. It remained undisputed that the financier secured by the respondent was also concerned with the respondent's precarious E position in only securing a short term lease of three years for the intended 23 years' project period. Thus, even the financier similarly required the respondent to appropriately secure the 23 years' LLA from the Government of Malaysia. The financier placed its own condition precedent upon the respondent to obtain the LLA *before the financier would allow any drawdown for* F *the LSS1 project*. This condition precedent was placed by the financier via the financier's solicitors' letter dated 4 June 2018:

> One of the condition precedent in order to achieve financial close of the Facilities is extension the lease over project land for 23 years, and once of the utilisation conditions of the Facilities is registration of the lease over project land. The G Financiers have been informed that the registered lease over the project land has yet to be issues by the relevant land authority as at the date hereof.
>
> Yours faithfully,
>
> H
>

[21] Thus, the respondent's contractual obligation to timeously obtain the I LLA was clearly important not only to the appellant, but also to the respondent's financier as such uncertainty of continued access and control of the project site would certainly put the entire LSS1 project at grave risk of failure and loss. Therefore, it should have been immensely clear to all parties

(especially the respondent) *that proper certainty via the LLA should be promptly obtained by the respondent within time so as to enable the Project to proceed at a more solid and firm footing*.

[22] And this common and mutual need of timeous and prompt certainty remained unchanged and uncontroverted for the entire life of the LSS1 award from the time it was awarded to the respondent, until the time it was withdrawn by the appellant (due to the respondent's continued failure to obtain the LLA within the set contractual time).

The respondent's repeated continuous breach of the RFP1, LSS1 award, and the SPPA and the appellant's conditional extensions of time

[23] It was readily admitted by the respondent that the respondent had to repeatedly seek for time extensions from the appellant to extend the FCD deadline and the COD deadline as the respondent was unable to obtain the requisite LLA (as per their own promise and agreement to do so within time).

[24] The appellant's kind discretion and patience were repeatedly stretched far too thin only for the respondent to continue its series of failure to deliver its end of the bargain. In total, the appellant (at the respondent's requests) had granted *four* CONDITIONAL *extensions of time* ('conditional EOT's') in which the appellant had extended the FCD date to SPECIFIC NEW DEADLINES. Upon the fourth and last of the conditional EOTs, the appellant had extended the FCD date from 30 July 2017 to 31 May 2018 ('final FCD date'). The appellant NEVER ALLOWED ANY EXTENSION OF THE COD DATE and thus, had always maintained that time is of the essence and that the respondent was still expected to achieve COD within the original COD date agreed under the LSS1 award.

[25] It must be kept in mind that LLA for LSS1 award (for the LSS1 project) EVEN TO DATE HAD NEVER BEEN OBTAINED BY THE respondent. The respondent had only obtained LLA for LSS3 on 25 February 2019. Thus, the immutable truth was that even past the expiration of the final FCD date, the respondent had maintained its streak of breach and failure to obtain the requisite LLA (for LSS1) to achieve FCD.

[26] In view of the respondent's admitted continuous breach of the LSS1 award, the appellant was at liberty to elect to either allow any further extension, or to terminate the LSS1 award. As the respondent had already flouted all specific deadlines for the fourth time around, it was only commercially sensible for the appellant to withdraw the LSS1 award and cease dealing with the

non-performing respondent. Indubitably, the appellant via its letter dated 12 July 2018 to the respondent, had withdrawn the LSS1 award ('withdrawal letter').

The respondent's peculiar claim before the High Court

[27] Despite the respondent's slew of repeated breach of the LSS1 award, the respondent commenced an action against the appellant claiming that the appellant's withdrawal and termination of the LSS1 award was unlawful. By and large, the respondent staked its claim on these contentions:

(a) it was incumbent upon the appellant under s 33 of the Contracts Act 1950 to wait for the Government of Malaysia to grant the LLA to the respondent ('the contingency') because the performance of the LSS1 award was contingent to the contingency which was 'out of the respondent's control';

(b) due to the granting of the conditional EOTs, the appellant was estopped from denying that time was already at large; and

(c) due to the granting of the conditional EOTs, the appellant has acted in manners which lead the respondent to legitimately expect that the appellant shall wait until the contingency to occur.

[28] The learned judge however in our view, had unfortunately embarked on his own tangent much different than the contentions of all the parties. The learned judge instead referred to ss 32 and 36 of the Contracts Act 1950. In referring to these two provisions, the learned judge had reached the incorrect reading and interpretation of the provisions and the principles governing contingent (or conditional) contracts with stipulations as to time:

(a) the learned judge initially correctly assessed that the LSS1 award was a contingent contract (primarily on the condition precedent for the respondent to obtain the LLA and achieve FCD within time);

(b) however, his analysis took a wrong turn when he wrongfully removed all stipulations regarding 'time' within s 36 of the Contracts Act 1950, and wrongly shifted the rule to only look at 'possibility to perform'; and

(c) the learned judge erroneously concluded that contractual time limitations should not bar performance of a contract, when the contract was still possible to be performed albeit outside the contractually agreed time:

> 32. Reading both this provisions it is clear that a contigent or conditional contracts become void if the contigent event becomes impossible to perform. However, if the events can be achieved but not within the specified time then the under the law this contract can still be enforced under the law.

OUR ANALYSIS AND FINDINGS

[29] From the outset, we are of the considered view that this appeal must be allowed as the incorrect interpretation of the law by the learned judge was significantly contradictory to rudimentary principles of time in contracts, and would have led to an undesirable precedent which would render any time stipulations within a contract to be meaningless. Contracts do not only consider the 'possibility of performance of a contingency' but also the time limit in which a contingency was required to be performed. If possibility was the only consideration in determining the validity of a contract, then any unfortunate party would be forced to accept late performance of a contract, even if the late performance was 'still possible' a whole century after the lapsing of the contractual time. A precedent and principle which was clearly illogical both by law and fact. This certainly could not have been the intention of the parliament when drafting the Contracts Act 1950.

[30] As a preliminary point, it must be pointed out here that the appellant's contention in para 39 of their written submission in reply which insisted that the LSS1 award was not a contingent contract but instead was a 'commercial' contract was misconceived. In our view this contention by the appellant was a clear misunderstanding of the definition and nature of a contingent contract. It was clearly wrong for the appellant to contend that a commercial contract cannot be a contingent a contract. A contingent contract does not derive its nature from the subject matter of the contract but instead it derives its nature from the terms of a contract (which carries conditions and contingencies). A contingent contract simply means *a contract that it's performance (or enforceability or validity) was subject to contingency(ies) or condition(s)*. This is literally prescribed in s 32 of the Contracts Act 1950:

> 32 A 'contingent contract' is a contract to do or not to do something, if some event, collateral to the contract, does or does not happen.
>
> ILLUSTRATION
>
> A contract to pay B RM10,000 if B's house is burnt. This is a contingent contract.

[31] In direct application to the appeal before us, the appellant agreed to proceed with the LSS1 award, if the respondent manages to achieve FCD (and obtain the LLA) within the final FCD deadline. Clearly here that the LSS1 award was indeed a contingent contract with stipulation of time.

[32] Section 32 of the Contracts Act 1950 is only a general provision defining a contingent or conditional contract. It must be understood that there exist specific provisions within the Contracts Act 1950 catering to specific and distinct forms or nature of contingent contracts.

[33] We are most aware that the respondent had contended ad nauseam that the LSS1 award falls within the category of contingent contracts governed under s 33 of the Contracts Act 1950. This provision reads as follows:

> 33 Enforcement of contracts contingent on an event happening
>
> (a) Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.
>
> (b) If the event becomes impossible, such contracts become void.
>
> ILLUSTRATIONS
>
> (a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
>
> (b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.
>
> (c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

[34] The respondent was desperately clinging onto this provision as this provision contains elements of 'uncertainty' of future events which arguably was 'out of the respondent's control'. But the respondent's reliance on s 33 was plainly wrong. Section 33 of the Contracts Act *does not at all have any stipulation as to time* that an event or contingency MUST *occur*. This was clearly reflected in the illustrations under the same provision. The illustrations only dealt with the 'postponement' of a contingent contract's enforceability until the contingency occurs. Succinctly, s 33 only applies in instances where the enforceability of a contingent contract was conditional upon a contingency WITHOUT ANY SET TIME LIMIT OR DEADLINES.

[35] But the facts of the appeal before us were entirely different and incompatible to be examined under s 33 of the Contracts Act. The LSS1 award was not only contingent to the obtainment of the LLA (and achieving FCD). Instead the LSS1 award was contingent to the obtainment of the LLA (and achieving FCD) WITHIN A SPECIFIC CONTRACTUAL TIME LIMITATION.

[36] The burning issue in this appeal was the respondent's continued failure to adhere to the time conditions of the LSS1 award and not at all concerning the time when the appellant can enforce the LSS1 award. The LSS1 award was already in operation and was already underway in its performance.

[37] The respondent incessantly relied upon the Federal Court's decision in *National Land Finance Co-Operative Society Ltd v Sharidal Sdn Bhd* [1983]

2 MLJ 211 despite the fact that the factual matrix and the principles within *Sharidal*'s case was entirely distinct, distinguishable, and irrelevant to the present case. In *Sharidal*, the FC dealt with the issue of the enforceability of a SPA where the SPA was subject to the approval of the authorities (the Foreign Investment Committee ('FIC')). THERE WAS NO ISSUE OR STIPULATION WHATSOEVER AS TO ANY TIME LIMIT FOR THE FIC APPROVAL TO BE OBTAINED.

[38] The niche issue in *Sharidal* was the parties' dissonance as to the finality of the FIC's rejection or non-approval. The FC embarked to demystify the enforceability of the SPA in the context of the question whether the FIC's rejection was a full rejection or a conditional rejection. The 'postponement' in *Sharidal* had nothing at all to do with any time stipulation. Instead, the parties there were arguing whether or not parties had to 'further wait' until the FIC's rejection was absolute and whether the SPA's termination was 'premature'.

[39] It is exceedingly and glaringly obvious that the principle in *Sharidal* was absolutely irrelevant and inapplicable to the appeal before us. The respondent's reliance on s 33 of the Contracts Act 1950 was utterly misconceived. Section 33 was entirely irrelevant as it only dealt with contracts conditional to the occurrence of an uncertain event (without any stipulation of time). Of course, if the contract was conditional to an event happening with time at large, then the time to perform the contract shall be 'postponed' until the occurrence of the event.

[40] But this was not at all the case in the present appeal. This appeal concerns a contract that is conditional to the occurrence of an event within a set time. And the specific provision dealing with such contract when time is of the essence would be s 36 of the Contracts Act 1950 and not s 33.

[41] In actuality, the Contracts Act 1950 already prescribed the rules that govern specific contingent contracts which contain specific stipulations as to time (or time limitation for a contingency to occur). That specific provision would be s 36 of the Contracts Act 1950:

> 36 When contracts become void which are *contingent on happening of specified event* WITHIN FIXED TIME
>
> (1) Contingent contracts to do or not to do anything if a specified uncertain event happens WITHIN A FIXED TIME become void if, at the expiration of the time fixed, the event has not happened, or if, before the time fixed, the event becomes impossible.
>
> ...
>
> ILLUSTRATIONS

A (a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.

B **[42]** The learned judge's brief examination of s 36(1) of the Contracts Act 1950 had unfortunately yielded a completely erroneous reading of the law. Somehow the learned judge had omitted the essence of time and had only placed reliance on the essence of possibility within the provision.

C **[43]** It must be properly understood that the two provisos in s 36(1) of the Contracts Act MUST BE READ DISJUNCTIVELY:

Limbs	
First limb	Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time BECOME VOID IF ...
Second limb (first proviso)	at the EXPIRATION OF THE TIME fixed, the event has not happened, OR ...
Third limb (second proviso)	before the time fixed, the event becomes impossible.

D

E **[44]** It can be literally understood that the first proviso of the provision does not concern at all whether or not the event was possible or otherwise. The *first proviso specifically and exclusively concerns about TIME*. Thus, the first proviso plainly stipulates that a contract becomes void if the event (in this case the FCD) was not achieved within the contract's stipulated time period. This interpretation remains unshaken notwithstanding even if the FCD (the LLA) was still possible to be achieved or obtained after the contractual time.

F

G **[45]** The second proviso only concerns contracts where the event can be identified to be impossible to be performed before the expiration of the contractual time. The manner of 'possibility' in this second proviso had no relevance whatsoever to the present appeal.

H **[46]** It matters not if the LLA may be obtained (or FCD be achieved) even 100 years in the future as it still does not detract from the fact that the LLA was not obtained (and FCD was not achieved) within the contractual time period.

I **[47]** The learned judge's misinterpretation would absolutely diminish the statute's spirit and the party's autonomy and intent to have time to be of the essence. If we were to subscribe to the learned judge's interpretation of the provisions, then any and all contract would be at large as any party must accept all late (and out of time) performance of the contract so long as the performance of the contract was still 'possible'.

[48] We are guided by the Privy Council's decision in the case of *Aberfoyle Plantations Ltd v Khaw Bian Cheng* [1960] 1 MLJ 47 which had held the following:

> The following general principles are warranted by authority and manifestly reasonable: (a) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date; (b) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time; and (c) where a conditional contract of sale *fixes* (whether specifically or by reference to the date fixed for completion) *the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles*. (Emphasis added.)

[49] Mary Lim JC (now FCJ) had applied *Aberfoyle* in Her Ladyship's reported decision in *Amarjit Singh a/l Kartar Singh v Kung Boon Chin & Ors* [2010] 8 MLJ 149:

> Applying those principles to the facts of this case, *there is no room for suggesting that the conditions precedent may be fulfilled by a time other than the date fixed*, that is, 13 January 2006. The compliance requirements are strict on both parties. (Emphasis added.)

[50] Thus, the respondent's contention on the granting of the LLA being 'out of its control' had no bearing whatsoever in the appeal before us. It was plain and simple that the respondent had unequivocally undertaken the contractual responsibility to obtain the LLA (and achieve FCD) within the final FCD deadline. Whatever problem the respondent might face in procuring the LLA was not at all the appellant's concern. Uncertainty and risk are the essences of commerce. The respondent promised to achieve FCD and obtain the LLA within the final FCD deadline despite knowing the risk that the Malaysian Government might not align with the respondent's contractual timeline. When the risk ran against the respondent, the respondent cannot now blame their inability to deliver on its promise as the respondent had taken that risk upon itself. Nor can the respondent expect the appellant to forever extend their 'generous' discretion beyond the contractual timeline that the appellant had already placed (and agreed upon by the respondent).

[51] At this juncture, we have already unravelled the learned judge's misinterpretation of the law as well as the respondent's misconceived reliance on s 33 of the Contracts Act 1950. Now, the other contention supposed by the respondent to 'liberate' itself from any time constraints was that 'time was already at large'. The respondent argued that the four conditional EOTs granted by the appellant was somehow 'proof' that either time was no longer of essence, or that the appellant had acquiesced and agreed that it was reasonable

for the respondent be afforded additional time to comply with its contractual obligation.

[52] The learned judge also erroneously agreed with the respondent and went on to state that by granting the four conditional EOTs, the appellant must have admitted to the complexity of the LLA approval process.

[53] However, the error and folly in this conclusion were glaring as the learned judge, and the respondent had failed to appropriately appreciate the fact that each of the conditional EOTs had stipulated specific and strict deadlines for the respondent to adhere to. In fact, none of the four conditional EOTs had allowed for any extension of time for the COD date. Thus, despite the conditional extensions granted for the FCD date, the appellant had always remained resolute that the LSS1 project should be commercially operative by the same exact COD date agreed upon under the LSS1 award (being 31 December 2018). Therefore, it would be grossly wrong to infer that the appellant had abandoned any conditions as to time considering the uncontroverted fact that the appellant remained unmoved in respect of the COD date.

[54] It would be remiss if we were to ignore the fact that the EOTs were all CONDITIONAL EOTs which did not at all purport to leave time at large. Instead, the conditional EOTs had always substituted the prior deadline *with new specific and strict contractual deadlines*. In such cases of substitution with new specific deadlines, it has long been a trite principle that such conditional EOTs do not render time to be at large. We are first guided by the decision in *Ibsul Development (SEL) Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2016] MLJU 420:

> Time was always an essence. *Although extensions of time were given, all extensions were given with exact times of payment to be complied with. The effect of giving time extensions does not condemn a contract into a black hole of indefinite time* for a party to perform its obligation as and when a party fancies.
>
> ...
>
> This new extended date becomes a new essence of time in which must be complied with by the parties to the contract. *And failure to comply with this new stipulation and essence of time entails a clear breach to the contract.* (Emphasis added.)

[55] The same sentiment was upheld in the Court of Appeal's decision in *Loke Yuen Cheng & Anor v Vimtex Sdn Bhd* [1998] 4 MLJ 169:

> They did not do anything to encourage the respondent to try to complete after that date. *All that they did was to grant an extension of time to a fixed date (that is 13 January 1993) to complete at the request of the respondent under cl 19. In my judgment, the appellants' conduct was not such as to amount to waiver* within the

encapsulation of the principle in the judgment of Goulding J *(Luck v White* (1973) 26 P & CR 89 at p 96).

Indeed, if the parties have once made time of the essence of the contract, *the mere extension of the period to a new fixed date would on the authorities have preserved the position that time was of the essence*, without fresh stipulation to that effect by Goulding J in *Luck v White* at p 95).

Buckley LJ in *Buckland & Ors v Farmer & Moody* said (at p 937):

> If a vendor has once made time of the essence of the contract and *then allows a further extension to a fixed date then time remains essential*.

In Barclay v Messenger (1874) 43 LJ Ch 449, MR said (at p 456):

> It appears to me plain that a mere extension of time, and nothing more, *is only a waiver to the extent of substituting the extended time* for the original time, and *not an utter destruction of the essential character of the time*.

The extension granted to the respondent was an extension to a fixed date so that the time remains essential. In my judgment, the contract was rescinded by the notice to the respondent on 14 January 1993 ... (Emphasis added.)

[56] On the same score above, it also cannot be said that the appellant had conducted itself in any manner that would have led the respondent to legitimately expect that the appellant would 'accept' late performance of the LSS1 award beyond the final FCD date and the COD date.

[57] Even if the parties mutually understood the complexity and the time required to execute the project, it does not automatically mean that the parties would wait *ad aeternum* until the delinquent respondent would be able to deliver its bargain (beyond any timeframe contractually agreed upon). Instead, it simply meant that if the respondent was not able to secure the LLA for 23 years within the set contractual period, then the appellant should not be legally expected to eternally wait until the respondent can do so (and thereby the appellant was at liberty to terminate the LSS1 award).

OUR DECISION AND ORDERS

[58] In view of the above deliberations, we hereby find the following:

(a) although the learned judge had misinterpreted ss 32, 33, and 36 of the Contracts Act 1950, the learned judge was still correct to find that the LSS1 award was a contingent or conditional contract (although not in the manner understood and argued by the respondent);

(b) the learned judge had clearly embarked on an erroneous analysis, interpretation, and application of ss 32 and 36 of the Contracts Act 1950;

(c) the learned judge had erred in relying on s 33 of the Contracts Act (which was inapplicable in the appeal before us);

(d) the learned judge had failed to comprehend and appreciate the true interpretation and spirit of s 36 of the Contracts Act 1950 by omitting and ignoring the very essence of 'time' embedded within the provision;

(e) the learned judge had erred in finding that the granting of the four conditional EOTs would render time to be at large; and

(f) the learned judge had erred in finding that the appellant had conducted itself in manners which would lead the respondent to have legitimate expectation that the appellant would accept late performance of the LSS1 award beyond the final FCD date and the COD date.

[59] Despite the fact that the learned judge had concluded the case in error, it was still correct for the learned judge to proceed to decide the matter of liability separately and ahead of the matter of quantum under O33 r 2 of the Rules of Court 2012.

[60] We hereby set aside the learned judge's decision to allow the respondent-plaintiff's claim on liability. In turn, we accordingly find that the respondent-plaintiff's claim was entirely unsustainable and thus, we hereby dismiss the respondent-plaintiff's claim.

[61] There was no reason for us to further delve into the appellant-plaintiff's application for stay of the High Court proceedings ('encl 3') as the learned judge's decision on liability has already been set aside (and the plaintiff-respondent's claim has already been dismissed). Enclosure 3 is now moot.

[62] We accordingly also set aside the learned judge's decision, order, or direction to proceed with trial as to the matter of quantum.

[63] In view of the above decisions and orders, we hereby allow the appeal. We order costs of RM40,000 (here and below) to be paid by the respondent to the appellant.

Appeal allowed; all orders, directions and decision made by the High Court set aside; and respondent's claim against the appellant dismissed.

Reported by Ashok Kumar